2012 WL 11894962 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

Samuel L. KEALOHA, Jr., Virgil E. Day, Josiah L. Hoohuli, and Patrick L. Kahawaiolaa, Plaintiffs-Appellants,
and
Mel HOOMANAWANUI, Appellant,
v.
Colette Y. PI'PPI'I MACHADO, individually and in her official capacity as Chairperson and Trustee of the Office of Hawaiian Affairs; S. Haunani Apoliona, Rowena Akana; Donald Cataluna; Carmen Lindsey Oswald Stender; Peter Apo, Robert K. Lindsey, Jr.; and John D. Waihe'e IV, individually and in their official capacity as Trustees of the Office of Hawaiian Affairs, Defendants-Appellees.

No. AP 11-0001103.
May 30, 2012.

Civil No. 10-1-1962-08 KKS (Other Civil Action)
Appeal from the Final Judgment, Filed December 6, 2011
Circuit Court of the First Circuit
Hon. Karl K. Sakamoto, Presiding

Opening Brief

Walter R. Schoettle 1559, P. O. Box 596, Honolulu, Hawaii 96809-0596, Telephone: 537-3514, fax: 924-1548, email: papaaloa@umich.edu, for plaintiffs-appellants.

***i** TABLE OF CONTENTS

***ii** TABLE OF AUTHORITIES

Cases cited:

***1 I. Statement of the case**

A. Nature of the case.

This is an action for breach of trust pursuant to H.R.S. § 10-16(c) and common law of trusts, brought by native Hawaiian beneficiaries of the trust established by §§ 4 and 5(f) of the Hawaii Admission Act, Article XII, Sections 4, 5 and 6 of the Hawaii State Constitution and H.R.S. § 10-3(1) against the Trustees of the Office of Hawaiian Affairs in their individual capacities for an accounting for funds that have been misappropriated (or misapplied) to the use and benefit of non-beneficiary Hawaiians not meeting the one-half part blood quantum established by § 201(a)(7) of the Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34,42 Stat. 108 (1921) (hereafter "HHCA") and for injunctive relief enjoining defendants from making such misappropriations (or misapplications) in the future.

2** ***B. Course and disposition of proceedings below.

On March 10, 2006, Appellants filed an amended complaint in the United States District Court for the District of Hawaii, Civil No. 05-0649, against Defendants APOLIONA, AKANA, CATALU MACHADO, STENDER; and WAHE alleging as follows: Plaintiffs are native Hawaiians as defined by HHCA and H.R.S. 10-2. Doc. 16, p 72, ¶ 4. Plaintiffs are "native Hawaiian" beneficiaries of the trusts established by § 5(f) of the Hawaii Admission Act and Article X, Sections 4 and 6 of the Hawaii State Constitution. Id., pp. 77-8,¶24. That defendants are trustees of the Office of Hawaiian Affairs, Id., pp. 72-3, ¶¶ 5-6, and, as such, are obligated to expend § 5(f) funds for the sole purpose of the betterment of the condition of native Hawaiians. Id., p. 74, ¶ 9-10. In violation of their said fiduciary duty owed to Plaintiffs-Appellants under common law and H.R.S. § 10-16(c), Id. pp. 77-8, ¶ 24, said defendants have expended trust funds without regard to the one-half part blood quantum. Id, p. 74, 11. That Plaintiffs-Appellants have been injured by said misappropriation of trust funds. Id., p. 75, ¶ 13.

The complaint seeks an accounting for trust funds allegedly misappropriated, Id., p. 80,1 a, and injunctive relief enjoining defendants from expending trust funds for any purpose other than the betterment of native Hawaiians. Id., p. 81, ¶ e.

In addition to the above-described claim under state law, the federal amended complaint asserted a similar claim under federal law, pursuant to 42 U.S.C. § 1983, for breach of trust under § 5(f) of the Hawaii Admission Act. Id., p. 72, ¶ 1.

On August 10, 2006, the U.S. District Court dismissed the federal amended complaint on the grounds that Plaintiffs-Appellants did not have standing to bring suit in federal court under 42 U.S.C. § 1983. Id., 123-138. The state claims pursuant to H.R.S. § 10-16(c) and common law, were dismissed *without prejudice.* Id., pp. 136-7.

Plaintiffs-Appellants appealed to the Ninth Circuit Court of Appeals from the dismissal of the federal § 1983 claim, but did not appeal the dismissal of the state claims without prejudice. Day v. Apoliona, 496 F.3d 1027, 1030 (9th Cir. 2007) ("Day I". On the issue of standing to bring a federal claim for breach of trust pursuant to § 1983, the Ninth Circuit reversed and remanded the case to the District Court for further proceedings. Id. at p. 1039.

On remand, Defendants admitted that they have been using trust funds to support the Akaka Bill and the three social programs which provide services to Hawaiians without regard to blood quantum. Doc. 16, p. 87. However, they argued that these expenditures are all justified by one or more ***3** of the five purposes authorized by § 5(f), and the District Court agreed and granted summary judgment in favor of the OHA defendants. Id, p. 97. Alternatively, the District Court held that the Defendants were entitled to qualified immunity. Id.

Plaintiff-Appellants again appealed to the Ninth Circuit, arguing that Defendants are limited to the single purpose of the betterment of the condition of native Hawaiians by state law, and that state law is incorporated into federal law by the language of § 5(f) which states, "as the constitution and laws of said State may provide." Id., p. 98. Alternatively, Plaintiffs-Appellants argued that even if OHA is not limited to the single purpose of the betterment of the condition of native Hawaiians, the expenditure of trust funds for Hawaiians as alleged in the amended complaint was not authorized by any of the other § 5(f) purposes. Id.

At oral argument before the Ninth Circuit, counsel for the OHA defendants and the Attorney General both conceded that, under state law, OHA is limited to the single purpose of the betterment of the condition of native Hawaiians in the expenditure of § 5(f) trust funds. Id., pp. 139-40. The Court of Appeals also recognized that under state law it appears that OHA is limited to the single purpose of the betterment of the condition of native Hawaiians. Id., p. 96. However, the Ninth Circuit held that state law was not incorporated into § 5(f) and that OHA is entitled, under federal law, to expend trust funds on any of the five § 5(f) purposes. Id., p. 99.

The Ninth Circuit then went on to conclude that, under federal law, OHA trustees had discretion to expend § 5(f) trust funds on each of the challenged expenditures under the betterment of the condition of native Hawaiians § 5(f) purpose. With respect to the Akaka Bill, the court found that while the lack of a blood quantum would result in a dilution of benefits to native Hawaiians, OHA had discretion to determine that that "drawback" was outweighed by other benefits to native Hawaiians. Id., p. 101. The court also held that OHA trustees had discretion under federal law to determine that contributions to the three social service agencies were authorized by one or more of the § 5(f) purposes. Id. The Ninth Circuit affirmed the dismissal of the federal § 1983 claims. Id., p. 102; Day v. Apoliona, 616 F.3d 918 (9th Cir. 2008), cert.den.131 S.Ct. 1501 (2011) ("Day IF).

Plaintiffs-Appellants filed a petition with the United States Supreme Court for a writ of certiorari, which was denied on February 22, 2011. Doc 16, p. 103; Day v. Apoliona, 131 S.Ct. 1501 (2011) ("Day III").

On March 23, 2011, Plaintiff-Appellants filed the complaint in this action in the Circuit Court for the First Circuit, State of Hawaii. Doc 16, p. 13. The allegations in this state complaint are very ***4** similar to the allegations in the federal amended complaint, except that this state complaint allows OHA defendants more discretionary leeway in expending trust funds which might also provide collateral benefits to non-beneficiary Hawaiians. The state complaint alleges: Plaintiffs are native Hawaiians as defined by HHCA and H.R.S. § 10-2. Id, p 14, ¶ 1. Plaintiffs are "native Hawaiian" beneficiaries of the trusts established by § 4 and 5(f) of the Hawaii Admission Act and Article XII, Sections 4, 5 and 6 of the Hawaii State Constitution. Id., ¶ 2. That defendants are trustees of the Office of Hawaiian Affairs, Id., ¶¶ 3-4. Defendants have breached their fiduciary duty owed to Plaintiffs-Appellants under common law and H.R.S. § 10-16(c), Id. p. 17, ¶ 16, said defendants have expended trust funds without regard to the one-half part blood quantum. Id, pp. 15-16, 1 11. Plaintiffs-Appellants have been injured by said misappropriation of trust funds. Id., p. 16, ¶13.

The state complaint seeks an accounting for trust funds allegedly misappropriated, Id., p. 17, a, and injunctive relief enjoining defendants from expending trust funds for any purpose other than the betterment of native Hawaiians. Id., ¶ b.

The only significant difference between the two complaints is between paragraph 10 of the federal complaint and paragraph 10 of the state complaint. The federal complaint reads as follows:

10. By clearly established law, said trust funds must be expended by Defendants solely for the betterment of the conditions of "native Hawaiians."

Id., p. 74 [emphasis added].

And the state complaint reads as follows:

10. By virtue of their positions as Trustees of the Office of Hawaiian Affairs and recipients of trust funds, Defendants owe or owed a duty, clearly established by law, to Plaintiffs, and all other beneficiaries, to administer said trust in the sole interest of the beneficiaries, except for collateral benefits to non-beneficiaries, so long as the primary benefits of any action is enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries.

Id., p. 15.

Of course, the purpose of this change was to allow defendants the discretion to expend trust funds in a manner that might provide collateral benefits to non-beneficiary Hawaiians in the same manner and to the same extent as other state officials are allowed in claims against the state pursuant to H.R.S.§ 673-1.

On August 26, 2011, instead of answering the complaint, defendants filed a motion pursuant to H.R.C.P., Rule 12(b)(6), to dismiss the complaint on grounds of res judicata and collateral estoppel based on the judgment in favor of the OHA defendants in federal court in Civil No. 05-0649 as ***5** affirmed in Day II. Id., pp. 41-43. Defendants argued that, to the extent that Plaintiffs were alleging a breach of trust under § 5(f) of the Admission Act, the claim is barred by the holding of the Ninth Circuit in Day II. Id., p. 51. Further, Plaintiffs claims under state law are collaterally estopped by the Ninth Circuit's holding that all of the expenditures which Plaintiffs challenge were found to be within the trustees' discretion as bettering the condition of native Hawaiians. Id. Lastly, Defendants argued that the challenged expenditures are justified by an independent analysis as being justified as being for the betterment of the condition of native Hawaiians. Id.

Plaintiffs opposed the motion arguing that state and federal law with respect to claims for breach of trust by native Hawaiians is quite different. *Id.* pp. 16-18. Plaintiffs attempted to assert their claims under state law and the federal court dismissed them without prejudice. *Id.* p. 18. Even thereafter, Plaintiffs' argument that state law was incorporated into the federal law was rejected by the federal courts. *Id.*

Plaintiffs argued that, under state law, defendants have no immunity from suit for breach of trust. *Id.* p. 18-19. Under state law, defendants owe a strict duty of loyalty to the beneficiaries of the trust and do not have discretion to expend funds without regard to the blood quantum, except as provided by H.R.S. § 673-1(b)(1). *Id.*, p. 117, 119-20.

The court below ignored the grounds set forth in the motion and the arguments against it and dismissed the complaint for failure to state a claim. *Id.* p. 155-7. The written order, filed on October 12, 2011, dismissing the case states merely, “The Court has reviewed Plaintiffs' Complaint and found no allegations that would support their claim for breach of fiduciary duty as brought in their claim under section 10-16(c) of the Hawai'i Revised Statutes.” The oral ruling rendered by the court was as follows:

Urn, this court views this motion as it was brought as a 12B6 motion. A complaint therefore can be dismissed for failing to state a claim upon which relief can be granted. Under this 12B6 standard it would be proper if plaintiff can prove no set of facts in support of its claim that would entitle him to relief.

In reviewing the 12B6 motion the court would deem all allegations of the complaint to be true. Upon reviewing the complaint filed here, the court finds that even accepting all the allegations as true, plaintiffs have failed to state a claim upon which relief can be granted. The complaint here, plaintiffs have brought this suit under HRS 10-16 Subsection C which provides that in matter of misapplication for funds and resources in breach of fiduciary duty the OHA board members shall be subject to suit. However, in their complaint the only support plaintiffs provide for their claims are their allegations that OHA' s use of funds for the Akaka Bill, NHLC, ***6** Na Pua No‘eau, and Alu Like are expended for the benefit of Hawaiians without regard to the blood quantum.

Those allegations fail to establish a claim of breach of fiduciary duty under 1216C (sic) where plaintiffs' allegations that the funds are being expended without regard to blood quantum does not represent a per se violation of defendants' fiduciary duty. *Nowhere does it allege that defendants are using public trust funds specifically to better those of non-Native Hawaiian ancestry. Furthermore nothing in the allegations state that defendants are required to use the funds exclusively for the betterment of only Native Hawaiians.*

Plaintiffs allege that defendants are required to expend funds in a way which primarily benefits beneficiaries which are Native Hawaiians and that non-beneficiaries are only entitled to collateral benefits. The court dismisses this argument as this standard arises from language found in 673-1 Subsection Bl, a specific statute under the Native Hawaiian Trust Judicial Relief Act which

claim has not been brought or pled in the complaint itself. Additionally even if applicable, HRS 673-3 requires that plaintiffs first exhaust their administrative remedies before bringing suit in Circuit Court, a step that undisputedly has not been shown in the complaint thus the court would lack subject matter jurisdiction.

Even if plaintiffs were to have standing under 673-1, the language found in 673-1 Subsection B Subsection 1 is inapplicable here. That section refers to a waiver of immunity by state officers and employees in Hawaiian Home Land trusts and Native Hawaiian public trusts. However, there is a subsequent provision, 673-1 Subsection B, Subsection 3, which specifically addresses the issue of waiver of immunity for OHA members which is or arguably the case here.

Under 673-1B3 there is no such language relating to primary benefits going to beneficiaries. Finally even if it were applicable, 673-1 is merely a waiver of immunity and that statute addressing immunity. Permitting suits to be brought against state officials such as OHA board members however. However, in this case this waiver of immunity is already somewhat conceded under 10-16 which unequivocally permits suits in the case of a breach of fiduciary duty.

And, as previously discussed, no claim has been factually asserted sufficient enough to bring a claim here. Thus under 673-1 is at most a standing statute and does not provide a standard by which plaintiff can legally use against defendant to establish liability. In other words, the statute itself does not create a private cause of action.

In conclusion, the court has reviewed plaintiffs' complaint and found no allegations that would support their claim for breach of fiduciary duty as brought in their claim under 10-16 Subsection C. Therefore the defendants' motion is granted.

Doc. 14, pp. 12-15 [emphasis added]. [1]

***7** On November 8, 2011, Plaintiffs along with Appellant Mel Hoomanawanui filed a motion, pursuant to H.R.C.P., Rule 15(c), for leave to file an amended complaint. Doc. 16, pp. 160-1. The proposed amendments were as follows:

MEL HOOMANAWANUI was sought to be added as a Plaintiff. Id., pp. 161, 167. Defendants Walter HEEN and DANTE CARPENTER were dropped as defendants. Cf. Doc. 16, p. 14 with p. 168 (paragraph 6 deleted). Paragraph 13 of the original complaint was amended by the addition of "and in violation of H.R.S. § 10-16(c) and 708-874." Cf. Id, p 16, ¶ 13 with p. 170, ¶ 13. The words "expenditure", "expenditures", "misappropriation", "misappropriated", "expending", "misappropriation" and "misappropriated" in paragraphs 12,13,14,15, a and b, were replaced with the word "misapplication" to conform with the language of H.R.S. § 10-16(c). Cf. Id. pp. 16-7 with p. 170-1. Lastly, paragraph 11 of the original complaint was rewritten as paragraphs 11 and 12 of the proposed amended complaint. The original paragraph 11 states:

11. In violation of clearly established law, Defendants have expended trust funds without regard to the blood quantum contained in the definition of native Hawaiians in the Hawaiian Homes Commission Act, 1920 and H.R.S § 10-2, in particular as follows: [Then itemizing expenditures for the support of the Akaka Bill and contributions to Native Hawaiian Legal Corporation, Na Pua No'eau Education Program and Alu Like.]

Id. p. 15.

The proposed amendments are as follows:

11. First, without restricting the use of said trust funds to the trust purpose of the betterment of the condition of native Hawaiians of not less than one-half part of the blood, Defendants have contributed a portion of said trust funds to organizations whose purpose is the betterment of the conditions of Hawaiians without regard to blood quantum or status as beneficiaries of the trust specifically, but not limited, to the following: [Then itemizing contributions to Native Hawaiian Legal Corporation, NaPua No‘eau Education Program and Alu Like.]

12. Second: Defendants have misapplied trust funds by using a portion of said trust funds for the purpose of eliminating or diluting the beneficiary blood quantum established by the Hawaiian Homes Commission Act, 1920 and H.R.S. § 10-2, specifically, but not limited to the following: [Then listing support for state and federal legislation to create a native Hawaiian governing entity to be created by Hawaiians without regard to blood quantum.]

Id., pp. 169-70.

This motion was denied by the court below. *Id.*, pp. 294-5. Plaintiffs dismissed the claims ***8** against Defendants Heen and Carpenter, Id., pp. 300-01, and final judgment was entered in favor of the remaining Defendants, on December 6, 2011. *Id.*, pp 298-299. On December 29, 2011, notice of appeal was filed in the Circuit Court and herein. Doc. 1; Doc. 16, pp. 303-07. This notice of appeal correctly cites to the judgment entered herein on December 6, 2011, but attaches a judgment in another case as Exhibit "A" thereto. Doc. 1, pp. 3-4; Doc 16, pp. 305-6. A timely amended notice of appeal attaching the correct judgment as Exhibit "A" was filed in the Circuit Court and herein on January 4, 2012. Doc. 8; Doc. 16, pp. 314-18.

II. Statement of Points of Error

A. Whether the Court below erred in dismissing the complaint for failure to state a claim?

The Defendants moved to dismiss the complaint on grounds of res judicata and collateral estoppel. The court ignored these issues and sua sponte dismissed the complaint for failure to state a claim. The error was committed in the court's ruling on Defendants motion to dismiss. Doc. 14, pp. 12-15. Plaintiffs had no opportunity to object to this ruling. Plaintiffs, however, did later move to amend the complaint. Doc. 16, pp. 160-1. That motion was also denied. Id., pp. 294-5.

B. Whether dismissal is appropriate on grounds of res judicata or collateral estoppel?

Defendants' motion to dismiss the complaint was brought on grounds of *res judicata* and collateral estoppel. These issues were never addressed by the court below because the complaint was dismissed for failure to state a claim. However, the judgment of the court may be affirmed on any alternative grounds supported by the record. *Poe v. Hawaii Labor Relations Board*, 87 Haw. 191, 197, 953 P.2d 569, 575 (1998); *Jocelyn Delos Reyes v. Kuboyama*, 76 Haw. 137, 140, 870 P.2d 1281, 1284 (1994); *Enos v. Pacific Transfer & Warehouse, Inc.*, 79 Haw. 452, 459, 903 P.2d 1273, 1280, recon.den., 80 Haw. 187, 907 P.2d 773 (1995). The issues of *res judicata* and collateral estoppel were fully briefed and argued by the parties below but not ruled upon by the court. Therefore, it may be appropriate for this court to address these issues on appeal.

III. Standards of Review

A. Dismissal for failure to state a claim.

The complaint should not have been dismissed for failure to state a claim unless it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. Ravelo v. County of Hawaii, 66 Haw. 194, 198, 658 P.2d 883, 886 (1983) (quoting Midkiff v. Castle & Cooke, Inc., 45 Haw. 409, 414, 368 P.2d 887, 890 (1962)); ***9** Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 185-86, cert denied, 67 Haw. 686, 744 P.2d 781 (1985). This court must, therefore, view Plaintiffs' complaint in a light most favorable to them in order to determine whether the allegations contained therein could warrant relief under any alternate theory. Ravelo, 66 Haw. at 199, 658 P.2d at 886. In reviewing the circuit court's order dismissing the complaint, consideration is strictly limited to the allegations of the complaint and those allegations are deemed to be true. Au v. Au, 63 Haw. 210, 214, 626 P.2d 173, 177 (1981).

B. Res judicata and collateral estoppel.

The applicability of the doctrine of res judicata and/or collateral estoppel are questions of law. *Smallwood v. City and County of Honolulu*, 118 Haw. 139, 146, 185 P.3d 887 (App. 2008). Questions of law are reviewed under the right/wrong standard of review. *Best Place, Inc. v. Penn Am. Ins. Co.*, 82 Haw. 120, 123, 920 P.2d 334, 337 (1996).

In applying the doctrine of res judicata, three basic questions must ordinarily be answered in the affirmative: (1) Was the issue decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the doctrine is asserted a party or in privity with a party to the previous adjudication? *Morneau v. Stark Enterprises Ltd.*, 56 Haw. 420, 424, 539 P.2d 472, 475 (1975).

The doctrine of collateral estoppel bars litigation of an issue where: (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication. *Dorrance v. Lee*, 90 Haw. 143, 149, 976 P.2d 904, 910 (1999).

IV. ARGUMENT

A. Whether the Court below erred in dismissing the complaint for failure to state a claim?

1. Background.

It is generally accepted that the pre-European contact land tenure system in Hawaii was a feudal system, in which all of the land was "owned" by the king and granted by him to his chiefs known as konohiki, and by them, in turn, to tenant farmers. See Chinen, Jon Jitsuzo, "Original Land Titles in Hawaii", Library of Congress No. 61-17314 (1961), p. 1; Cannelora, Louis, "The Origin of Hawaii Land Titles and of the Rights of Native Tenants", Security Title Corp., Honolulu, Hawaii (1974), p. 1. However, prior to 1778, there was no king. Kamehameha I, only became king, in 1810, ***10** with the assistance of western influence. The so-called feudal land system was instituted by Kamehameha I after 1810.

Under a feudal system, the tenant farmer, serfs, have absolutely no interest in the land itself. This was not the situation in Hawaii. The maka'ainana, or commoners, had an interest in the land, which is still recognized to this day. Haw.Const., Art. XII, § 7; H.R.S. §§ 1-1 & 7-1; Kalipi v. Hawaiian Trust Co., 66 Haw. 1,4-9, 656 P.2d 745, 748-50 (1982). In pre-contact Hawaii, there was no concept of "ownership" of land. The land was a communal resource, no different from the sea or air. As the European concept of land "ownership" became recognized, the interest of the maka'ainana was more properly described as that of an undivided beneficial interest.

The English concept of a trust relationship was recognized in the first Constitution of the Kingdom of Hawaii adopted in 1840. As provided therein:

> "Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I was the head, and had the management of landed property."

State v. Zimring, 58 Haw. 106, 111 (1977) quoting Fundamental Law of Hawaii (1904) at 3 quoting The Constitution of 1840.

Pursuant to the desire of commercial interests to own land to the exclusion of others, the Board of Commissioners to Quiet Land Titles, commonly known as the Land Commission was established, on December 10, 1845, to adjudicate and settle disputes over titles of real property. Cannelora, supra, p. 7. It was recognized in the Principals of the Land Commission as well as the Privy Counsel that the ownership of the land at that time was held in equal one-third undivided interests by the King, the konohiki landlords and the *tenants living on the land.* Cannelora, supra, pp. 10, 12. See also *Thurston v. Bishop*, 7 Haw. 421, 430 (1888).

The problem was that the Land Commission had no means to divide these interests, so that fee simple ownership of land could not be obtained unless all of these parties joined in the deed. In order to solve this problem, Kamehameha III and the konohikis divided their lands between themselves in what is known as The Great Mahele. This was actually a series of divisions between the king and konohikis made between January 27, 1848 and March 7, 1848, which allowed the konohiki to take his or her claim to the Land Commission and obtain fee title *subject to the undivided one third interest of the native tenants.* Cannelora, supra, p. 13.

Native tenants were not able to obtain fee title to their interests until 1850, when legislation ***11** was enacted allowing them to present kuleana claims to the Land Commission. Cannelora, supra, 17-19. But the law did not favor the granting of such claims. First, native tenants were less well educated and less informed than the konohiki class and may not have been aware of their right to obtain title or the means to perfect it. Second, native tenants were given only a 4 and one-half year period within which to file their claims after which they were forever barred, while konohiki were given extensions of time totaling 49 years within which to file claims. Cannelora, supra, p. 19. Third, native tenants were required to incur the considerable expense of a survey of their claim, while konohikis were not. *Id.* Ultimately, only 28,658 acres were awarded to native Hawaiian tenants out of the 4.1 million acres of land in Hawaii. Uyehara, Mitsuo, "Hawaii Ceded Lands," Hawaiiana Almanac Publishing Co., Honolulu, 1977, p. 19. Thus, the legislation purporting to allow native tenants to obtain fee simple title to their land actually operated to extinguish the claims of the vast majority of native Hawaiian people who failed to go through the process of surveying and registering kuleana claims. Whereas before the mehele, native Hawaiian tenants owned an undivided one-third interest in the entire 4.1 million acres of land, after the mehele only a small number of them owned 28,658 acres, in fee simple, while the government held title to the land free and clear of any further kuleana claims. Upon annexation, the United States succeeded to ownership of 1.8 million acres of government land, a one-third interest in which had once been owned by the native Hawaiian tenants.

In an effort to address the injustice to the maka'anaina of being deprived of their land in the mahele, Congress enacted the HHCA, in 1921. *Nelson v. Hawaiian Homes Commission,* SCWC-30110 (Haw. 5-9-2012), p. 4. Unfortunately, this program has done little in its 90 years of existence to alleviate the landless condition of native Hawaiians. As of June 30, 2009, DHHL had awarded 9,748 homestead leases, "DHHL 2009 Annual Report", p. 29, and, as of December 31, 2010, there were 25,937 separate beneficiaries still on the waiting lists. DHHL Applicant Waiting List (Dec. 31, 2010) [2] at p. 4.

Upon admission of Hawaii into the Union, most of the public land in the state was conveyed to the State by §§ (b) and (e) of the Admission Act, including the home lands. However, Hawaii was given the responsibility and duty of implementing the HHCA by §§ 4 and 5(f) of the Admission Act. The people of the State accepted and ratified this responsibility and the State assumed a fiduciary obligation to the native Hawaiian people upon admission to the Union. ***12** Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161 (1982). In so doing, the state, through its agency the DHHL assumed the fundamental fiduciary duty to administer the Hawaiian home lands solely in the interest of the beneficiaries (native Hawaiians). Ahuna v. Dept. of Hawaiian Home Lands, 64 Haw. at 340.

Even after statehood, however, little was done to implement the HHCA. The State commingled § 5(f) income and proceeds with income and proceeds from other public lands and, then, relying upon the "one or more of the foregoing purposes "language in § 5(f), transferred these proceeds to the Department of Education and then transferred an equal amount from the DOE to the general fund. Uyehara, supra, at pp. 6-9.

Eventually, native Hawaiian beneficiaries began to organize in protest of the State's egregious breach of the § 5(f) trust. See Id, p. 15. The issue was purportedly addressed in the 1978 Constitutional Convention by the establishment of OHA to address prior **abuse** and neglect of native Hawaiian beneficiaries. Unfortunately that has only exacerbated the problem by syphoning money away from DHHL into a fund being accumulated by OHA for eventual transfer to a Hawaiian governing entity made up of Hawaiians without regard to blood quantum.

In 1978 a Constitutional Convention was convened resulting in what is now designated as Article XII of the Hawaii Constitution.

Sections 4, 5 and 6 of Article XII of the Constitution of the State of Hawaii provide as follows:
Section 4. PUBLIC TRUST

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Section 5. OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES.

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, ***13** Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

Section 6. POWERS OF BOARD OF TRUSTEES

The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Pursuant to these Constitutional provisions, the legislature enacted H.R.S., Chapter 10 establishing and governing the Office of Hawaiian Affairs.

H.R.S. § 10-3(1) establishes the primary duty of OHA, as follows:
(1) The betterment of conditions of native Hawaiians. A pro rata portion of all funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e).

Native Hawaiians are defined in H.R.S. § 10-2 as follows:

"Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

A second duty of OHA as provided by H.R.S. § 10-3(2) is the betterment of Hawaiians, without regard to blood quantum. Nevertheless, the proceeds and income from the public land trust are to be expended by OHA for the betterment of the conditions of native Hawaiians only. This was ***14** made clear by the Hawaii Supreme Court in *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 164-5, 737 P.2d 446 (1987), as follows:

Foremost among the goals to be pursued by OHA was "[t]he betterment of conditions of native Hawaiians." HRS § 10-3 fn[12] This purpose was singled out for special treatment, the legislature providing that a "pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians." fn[13] See supra note 2. And the powers given OHA included those of managing, investing, and administering "all income and proceeds from that pro rata portion of the trust[.]" HRS § 10-5 (1).

To dispel any remaining doubt on the issue, the Court made it clear that Hawaiians are not beneficiaries of the public land trust in footnote 13, which reads as follows:

> [fn13] Although the "betterment of conditions of Hawaiians" is another OHA goal, the legislature provided no special funding for this purpose as it had for native Hawaiians.

Footnote 12 merely quotes the statutory definitions of "Hawaiian" and "Native Hawaiian" contained in H.R.S. § 10-2.

Lastly, the legislature provided native Hawaiian beneficiaries with a means of redress for breaches of the public land trust by the OHA trustees, in H.R.S. § 10-16(c), which provides as follows:

> (c) In matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private counsel.

2. The dismissal of the complaint for failure to state a claim was erroneous.

a. Generally.

Hawaii is a notice pleading jurisdiction. Hawaii adopted rules of civil procedure that do not incorporate technical rules of pleading. H.R.C.P., Rule 1. In Bishop Estate Trust v. Castle & Cooke, 45 Haw. 409, 414, 368 P.2d 887, 894 (1962), the Hawaii Supreme Court adopted the notice pleading rule of *Conley v. Gibson*, 355 U.S. 41, 45-47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) that a complaint may not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would support a claim. This rule has been consistently followed by Hawaii courts since. *Ellis v. Crockett*, 51 Haw. 45, 61,451 P.2d 814 (1969); *Hall v. Kim*, 53 Haw. 219,491 P.2d 541 (1971); *Island Holidays, Inc. v. Fitzgerald*, 58 Haw. 552, 567, 574 P.2d 884 (1978); *Perry v. Planning Comm'n of County of Hawaii*, 62 Haw. 666, 685, 619 P.2d 95 (1980); ***15** *Au v. Au, supra*, 63 Haw. at 221; *Ravelo v. Hawaii County, supra*, 66 Haw. at 198; *Takaki v. Allied Machinery Corp.*, 87 Haw. 57, 65, 951 P.2d 507 (App. 1998); *Zanakis-P v. Cutter Dodge, Inc.*, 98 Haw. 309, 323, 47 P.3d 1222 (2002); Dupree v. Hiraga, 121 Haw. 297, 314, 219 P.3d 1084 (2009); *Tokuhisa v. Cutter Management Co.*, 122 Haw. 181, 192,223 P. 3d 246 (2009); *Dejetley v. halahala*, 122 *Hawaii* 251, 268, 226 P.3d 421, 438 (2010). In rendering his ruling herein, the court below stated this rule, but failed to follow it. Doc. 14, pp. 12-13.

The elements of a claim for breach of fiduciary duty are: (1) the existence of a fiduciary duty owed by defendant to plaintiff; (2) a breach of that duty; and (3) harm to the plaintiff or benefit to the defendant. *Armentano v. Paraco Gas Corp.*, 935 N.Y.S.2d 304,

90 A.D.3d 683, 684 (2d Dept 2011); *Bever Props. v. Jerry Huffman Custom Builder*, 355 S.W.3d 878, 891 (Tex.App. 2011); *Crusselle v. Mong*, 59 So.3d 1178, 1181 (Fla.App. 2011); *Gutierrez v. Girardi*, 194 Cal.App.4th 925, 932, 125 Cal.Rptr.3d 210 (2011); 37 Am. Jur. 2d Fraud & Deceit § 31 (2010).

b. Fiduciary duty of loyalty.

The complaint alleges that the plaintiffs are native Hawaiians as that term is defined by the HHCA and H.R.S. § 10-2. Doc. 16, p. 14, ¶ 1. The complaint alleges that the defendants are trustees of the Office of Hawaiian Affairs. *Id*, ¶¶ 3, 4. Taking these allegations as true, Defendants are trustees of the trust established by Article XII, Sections 4, 5, and 6, and H.R.S., §10-3(1). As a matter of law, therefore, as a matter of law, Defendant-trustees owe Plaintiff-beneficiaries a duty to administer the trust *solely in the interest of the beneficiaries.* 1 R § 170(1); 2A Scott Fratcher, T L OF TRUSTS §170 (4 Ed. 1987); Bogert Bogert, The Law OF Trusts AND TRUSTEES,§ 543 (Rev. 2 Ed. 1993), at 218; Bogert, T, 95 (6th Ed. 1987).

> The most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty. This duty is imposed on the trustee not because of any provision in the terms of the trust but because of the relationship that arises from the creation of the trust. A trustee is in a fiduciary relation to the beneficiaries of the trust. There are other fiduciaries, such as guardians, executors or administrators, receivers, agents, attorneys, corporate directors or officers, partners, and joint adventurers. In some relations the fiduciary element is more intense than in others; it is peculiarly intense in the case of a trust. *It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries.* He is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.

2A Scott & Fratcher, supra, at 311 [emphasis added].

A trustee is under a duty to the beneficiary of the trust to administer the trust solely ***16** in the interest of the beneficiary. The trustee must exclude all self-interest, as well as the interest of a third party, in his administration of the trust solely for the benefit of the beneficiary. The trustee must not place himself in a position where his own interests or that of another enters into conflict, or may possibly conflict, with the interest of the trust or its beneficiary. Put another way, the trustee may not enter into a transaction or take or continue in a position in which his personal interest *or the interest of a third party* is or becomes adverse to the interest of the beneficiary.

Bogert & Bogert, supra, § 543, at 218 [emphasis added].

The trustee owes a duty to the beneficiaries to administer the affairs of the trust solely in the interests of the beneficiaries, and to exclude from consideration his own advantages and the welfare of third persons. This is called the duty of loyalty.

Bogert, supra, § 95, at 341 [emphasis added].

The rule applies to conduct by the trustee which is in the interest of a third party, as well as to the case where his personal interest is involved. If the trustee was motivated by a desire to enrich a third person, the transaction is subject to attack on the ground of disloyalty. Thus if a trustee has realty for sale, and sells it to X for the purpose of enabling X to make a profit on a resale, even though T is not to obtain any financial advantage and even though the sale was otherwise unexceptionable, the sale would be vulnerable under the loyalty rule.

Id., at 342-3 [footnotes omitted].

In the instant case, native Hawaiians of not less than one-half part blood quantum are the beneficiaries of the trust. Hawaiians who do not meet the one-half part blood quantum are third parties. If the trustees enter into transactions which benefit non-beneficiary Hawaiians they are in breach of this dut of loalt

In Ahuna v. DHHL, supra, the Hawaii Supreme Court recognized this duty with respect to the trust obligation owed by the State of Hawaii to native Hawaiian beneficiaries under the HHCA, as follows:
One specific trust duty is the obligation to administer the trust solely in the interest of the beneficiary. *NLRB v. Amax Coal Co., 101 S.Ct. 2789 (1981). See Manchester Band of Pomo Indians, supra; see generally Societa Operaia Di Mutuo Soccorso Villalba v. DiMaria,* 40 N.J. Super. 344, 122 A.2d 897 (1956); In re Estate of Comerford, 388 Pa. 278, 130 A.2d 458 (1957); Restatement (Second) of Trusts § 170 (1959); G. Bogert, Trusts and Trustees § 543 (rev. 2d ed. 1978).

A second fundamental trust obligation is to use reasonable skill and care to make trust property productive, Manchester Band of Pomo Indians, supra, or simply to act as an ordinary and prudent person would in dealing with his own property. Id.; Richards v. Midkiff, 48 Haw. 32, 396 P.2d 49 (1964); Rippey v. Denver U.S. National Bank, 273 F. Supp. 718 (D. Colo. 1967). We understand that a trustee is not expected to be infallible in his judgments or decisions. Hartmann v. Bertelmann, 39 Haw. 619 (1952). On the other hand, the reasonable prudent person standard ***17** applies to protecting and caring for the property and does not permit one to prudently speculate for instance. Rippey v. Denver U.S. National Bank, supra at 735.

Given these two basic duties of a trustee, we now impose them on the Hawaiian Homes Commission, the individual commissioners, and the Department to determine whether there has been a breach of fiduciary duties.

Ahuna v. DHHL, supra, 64 Haw. at 340 [emphasis added].

While *Ahuna* deals with the Hawaiian home lands DHHL side of the public land trust, the same duty of loyalty applies to the OHA portion of the trust. In *Trustees v. Yamasaki, supra,* the Hawaii Supreme so specifically held, as follows:
Foremost among the goals to be pursued by OHA was "[t]he betterment of conditions of native Hawaiians." HRS § 10-3, This purpose was singled out for special treatment, the legislature providing that a "pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and ***shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians."***

Trustees v. Yamasaki, supra, 69 Haw. at 164. [Emphasis added.]

After Ahuna and Yamasaki, the legislature enacted H.R.S. § 673-1, which is a waiver of the state's sovereign immunity for claims against the state for breach of the native Hawaiian public trust established by Article XII, Sections 4, 5, and 6 of the Hawaii Constitution. This statute imposes liability upon the state in the same manner as private trusts and trustees, with certain exceptions. The main exception is the duty to maximize revenue. The duty of loyalty is the only duty specifically imposed upon the state as an exception to this exception. H.R.S. § 673-1(b)(1). That duty also provides one exception to the exception to the exception with regard to collateral benefits to non-beneficiaries, as follows:
(a) The State waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of:

(1) The Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii, implementing sections 4 and 5(f) of the Admission Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4); and

(2) The native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act;

and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for punitive damages.

(b) This waiver shall not apply to the following:

(1) The acts or omissions of the State's officers and employees, even though such acts ***18** or omissions may not realize maximum revenues to the Hawaiian home lands trust and native Hawaiian public trust, ***so long as each trust is administered in the sole interest of the beneficiaries;*** provided that nothing herein shall prevent the State from taking action which would provide a collateral benefit to nonbeneficiaries, but only so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries;

(2) Any claim for which a remedy is provided elsewhere in the laws of the State; and

(3) Any claim arising out of the acts or omissions of the members of the board of trustees, officers and employees of the office of Hawaiian affairs, except as provided in section 10-16.

H.R.S. § 673-1 [Emphasis added.]

Of course, H.R.S. § 673-1 does not apply to OHA trustees as provided by subsection (b)(3), but H.R.S. § 10-16(c) imposes personal liability on Defendant trustees of OHA for any "misapplication of funds and resources in breach of fiduciary duty" and § 10-16(d) imposes liability for "other forms of remedies" "as provided by other provisions of law and by common law." H.R.S. § 10-16 provides as follows:
(a) The office may sue and be sued in its corporate name. The State shall not be liable for any acts or omissions of the office, its officers, employees, and the members of the board of trustees, except as provided under subsection (b).

(b) In matters of tort, the office, its officers and employees, and the members of the board shall be subject to suit only in the manner provided for suits against the State under chapter 662.

(c) In matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private counsel.

(d) In matters involving other forms of remedies, the office, its officers and employees, and the members of the board shall be subject to suit as provided by any other provision of law and by the common law.

In sum, Defendant OHA trustees owe Plaintiff beneficiaries a fundamental duty, as a matter of law, to administer the native Hawaiian public trust in a manner that is solely in their interest. The complaint herein alleges this fundamental fiduciary duty of loyalty in Paragraph 10 thereof, which states:

> 10. By virtue of their positions as Trustees of the Office of Hawaiian Affairs and recipients of trust funds, *Defendants owe or owed a duty, clearly established by law, to Plaintiffs, and all other beneficiaries, to administer said trust in the sole interest of the beneficiaries, except for collateral benefits to nonbeneficiaries,* so ***19** long as the primary benefits of any action is enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries.

Doc. 16, at 15 [emphasis added].

The court below misconstrued this allegation, holding that,
Furthermore nothing in the allegations state that defendants are required to use the funds exclusively for the betterment of only Native Hawaiians.

Plaintiffs allege that defendants are required to expend funds in a way which primarily benefits beneficiaries which are Native Hawaiians and that non-beneficiaries are only entitled to collateral benefits. The court dismisses this argument as this standard arises from language found in 673-1 Subsection B1, a specific statute under the Native Hawaiian Trust Judicial Relief Act which claim has not been brought or pled in the complaint itself. Additionally even if applicable, HRS 673-3 requires that plaintiffs first exhaust their administrative remedies before bringing suit in Circuit Court, a step that undisputedly has not been shown in the complaint thus the court would lack subject matter jurisdiction.

Doc. 14, at 13-14.

The complaint does not allege that defendants are required to expend funds in a way which primarily benefits native Hawaiians. The complaint alleges that Defendant trustees owe a duty of loyalty to administer the trust solely in the interest of native Hawaiians, with the provision that if an expenditure also benefits non-beneficiaries then the requirements of H.R.S. § 673-1(b)(1) must be met.

In any event, this is not really a factual allegation at all. Rather, the duty of loyalty is a duty that flows, as a matter of law, as discussed above, from the fact that the trust has been established with Defendants as trustees and Plaintiffs as beneficiaries.

c. Breach of duty.

i. Generally.

The complaint alleges in Paragraphs 11 and 12 that the Defendants breached their duty of loyalty, generally, by expending trust funds on Hawaiians without regard to blood quantum and, in particular, in supporting the Akaka Bill and three social programs which provide benefits to Hawaiians without regard to blood quantum. Doc. 16, pp. 15-16. The court below erroneously ruled that expenditure of funds without regard to blood quantum is not a per se violation of the trust, as follows:

> However, in their complaint the only support plaintiffs provide for their claims are their allegations that OHA's use of funds for the Akaka Bill, NHLC, Na Pua No‘eau, ***20** and Alu Like are expended for the benefit of Hawaiians without regard to the blood quantum. Those allegations fail to establish a claim of breach of fiduciary duty under 1216C where plaintiffs' allegations that the funds are being expended without regard to blood quantum does not represent a per se violation of defendants' fiduciary duty.

Doc. 14, p. 13.

This is patently wrong since status as beneficiary of the trust is defined with regard to blood quantum. Thus expenditures without regard to blood quantum are expenditures without regard to status as beneficiary, in violation of the duty to administer the trust in the sole interest of the native Hawaiian beneficiaries.

ii. The Akaka bill.

The complaint alleges that the Defendants have expended native Hawaiian public trust funds in support of the Akaka bill which would create a Native Hawaiian Governing Entity comprised of Hawaiians without regard to blood quantum. Doc. 16, p. 15, ¶ 11(a). Contrary to the ruling of the court below, using native Hawaiian public trust funds to support a governing entity for

Hawaiians without regard to blood quantum would appear, as a matter of law, to be a per se violation of the duty of loyalty to administer the trust in the sole interests of native Hawaiians. But OHA defendants have argued that the creation of such an entity will benefit native Hawaiians because it is intended as a means of defending against equal protection attacks on the native Hawaiian public trust on the grounds that it is a racial discrimination. This argument is specious.

First of all, the blood quantum native Hawaiians have already been recognized as native Americans by Congress in the HHCA and Hawaii Admission Act.

Second, numerous attempts to attack the native Hawaiian public trust on racial discrimination grounds have been made and all have failed for lack of standing. *Corboy v. Louie.*, 30049 (Haw. 4-27-2011), *cert.pending; Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007). Indeed, in Arakakiki v. Lingle, the court held that taxpayers *do not have standing* to challenge the native Hawaiian public trust provisions providing benefits to native Hawaiians but do have standing to challenge tax revenue funding to OHA for benefits to Hawaiians on equal protection grounds. This latter challenge was dismissed on political question grounds. Thus, the attempt to gain Congressional recognition of a Hawaiian Governing Entity (without regard to blood quantum) is a benefit *only* to Hawaiians who do not meet the blood quantum.

Third, a Hawaiian Governing Entity (without regard to blood quantum) would probably not be accepted by the U.S. Supreme Court as an Indian tribe for the very fact that there is no blood ***21** quantum. In *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044 (2000), the state tried to justify the Hawaiians only voter requirement for OHA trustees by analogizing OHA to an Indian tribe. The majority opinion cited a law review article as raising a serious question as to whether native Hawaiians could be given special benefits based on their "racial" status as Native Americans. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians,* 106 Yale L. J. 537 (1996). The plurality opinion of Justice Kennedy avoided the issue by holding that even if native Hawaiians were recognized as an Indian tribe, that would not permit discrimination in voting for OHA trustees, because OHA trustees are state officials not an Indian tribe and therefore subject to the provisions of the Fifteenth Amendment. *Rice v. Cayetano, supra*, 528 U.S. at 521-2.

Under this rationale, of course, creating a Hawaiian Governing Entity would not in any way protect programs giving special treatment to Hawaiians or native Hawaiians from equal protection attack as long as the programs were still run by the state of Hawaii. It would be necessary to turn the home lands and a pro rata portion of the §5(f) trust lands over to the entity in order for the Indian tribe analogy argument to be made.

To the extent that special treatment for native Hawaiians is prohibited as a racial discrimination, any transfer of state lands or funds to such entity would likewise be prohibited as an unconstitutional racial discrimination. But to the extent that such a transfer were permitted, turning native Hawaiian public trust lands over to such an entity would be a serious breach of trust. It would be the equivalent of ignoring the blood quantum in the administration of the HHCA. That, in turn, would require the approval of Congress and amendments to the Hawaii Constitution being ratified by the voters

One final enormous obstacle in the way of creating a Hawaiian Governing Entity (without including a blood quantum) was pointed out by Justice Breyer, in his concurring opinion in *Rice v. Cayetano, supra*, as follows:
As importantly, the statute defines the electorate in a way that is not analogous to membership in an Indian tribe. Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiians about 130,000 additional "Hawaiians," defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present). See Native Hawaiian Data Book 39 (1598). Approximately 10% to 15% of OHA's funds are spent specifically to benefit this latter group, see Annual Report 38, which now constitutes about 60% of the OHA ***22** electorate.

I have been unable to find any Native American tribal definition that is so broad. The Alaska Native Claims Settlement Act, for example, defines a "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska

Native by the Native village or Native group of which he claims to be a member and whose father or mother is... regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum requirement). 43 U.S.C. 1602(b). Many tribal constitutions define membership in terms of having had an ancestor whose name appeared on a tribal roll - but in the far less distant past. See, e.g., Constitution of the Choctaw Nation of Oklahoma, Art. II (membership consists of persons on final rolls approved in 1906 and their lineal descendants); Constitution of the Sac and Fox Tribe of Indians of Oklahoma, Art. consists of persons on official roll of 1937, children since born to two members of the Tribe, and children born to one member and a nonmember if admitted by the council); Revised Constitution of the Jicarilla Apache Tribe, Art. I (membership consists of persons on official roll of 1968 and children of one member of the Tribe who are at least three-eighths Jicarilla Apache Indian blood); Revised Constitution Mescalero Apache Tribe, Art. (membership consists of persons on the official roll of 1936 and children born to at least one enrolled member who are at least one-fourth degree Mescalero Apache blood).

Of course, a Native American tribe has broad authority to define its membership. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72, n. 32 (1978). There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members - leaving some combination of luck and interest to determine which potential members become actual voters - goes well beyond any reasonable limit. It was not a tribe, but rather the State of Hawaii, that created this definition; and, as I have pointed out, it is not like any actual membership classification created by any actual tribe.

These circumstances are sufficient, in my view, to destroy the analogy on which Hawaii's justification must depend.

Rice v. Cayetano, supra, 528 U.S. at 526-7 [Breyer, J. concurring].

Finally, it is simply not necessary to be concerned about an attack on programs for native Hawaiians under the public land trust on equal protection grounds because these programs do not involve a racial classification at all. The maka ainana people who inhabited the Hawaiian Islands prior to 1778 were unfairly and unjustly deprived of their land in the mahele. Much of that land was transferred to the United States at annexation and thence to the state of Hawaii on admission to the union. It is now held in trust, in part, for the betterment of the condition of the descendants of not less than one-half part of the blood of those people who once owned an undivided one-third interest ***23** in the land. As Prince Kuhio pointed out, HHCA was enacted to compensate native Hawaiians for the loss of their land during the mahele. It is not a racial classification at all, but rather a classification of degree of kinship to the people whose land was taken from them by the government.

The native Hawaiians might benefit from the creation of a governing entity that was created initially with a not less than one-half part blood quantum. This would, indeed, be analogous to the creation of Indian tribes under the Indian Reorganization Act, 48 Stat. 984 (6/18/1934); 25 U.S.C. 461, et seq. Title 25 U.S.C. §§ 476 and 477 allow "Indians" who are not members of a recognized tribe to organize to obtain recognition. The term "Indian" as used in the Indian Reorganization Act is defined as:

> The term Indian as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include *all other persons of one-half or more Indian blood.* For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

25 U.S.C. § 479 [emphasis added].

Under the IRA persons are recognized as Indians only if they are an enrolled member of a recognized Indian tribe or an Indian of not less than one-half part blood quantum. If an unrecognized Indian tribe wants to gain recognition they must start off with members of not less than one-half part blood quantum. Once the tribe has been recognized the tribe is free to redefine for itself the qualifications for membership.

Unfortunately, under 25 U.S.C. § 473 and regulations of the Department of the Interior, native Hawaiians were excluded from the recognition provisions of the IRA. In Kahawaiolaa v. Norton, 386 F. 3d 1271 (9th Cir. 2004), Appellants herein challenged this omission on equal protection grounds as a racial discrimination. The Ninth Circuit upheld the classification excluding native Hawaiians on the grounds that Congress had otherwise provided for native Hawaiians in the HHCA and Hawaii Admission Act. Kahawaiolaa v. Norton, supra, 386 F.3d at 1282-3. It would be contradictory to say that Hawaiians can be discriminated against in the IRA because of unconstitutional benefits granted to them in HHCA and the Admission Act.

Once a true native Hawaiian Governing Entity with a not less than one-half part blood ***24** quantum were established it should have the right like Indian tribes to redefine the qualifications for membership.

Lastly analyzing the expenditure of public trust funds to support the Akaka Bill under the H.R.S. § 673-(b)(1) standard results in the conclusion that the expenditures are a breach of fiduciary duty of loyalty. The Akaka Bill will definitely not primarily benefit the native Hawaiian beneficiaries. Indeed, to the extent that it benefits native Hawaiians differently than Hawaiians, it would benefit Hawaiians much more than native Hawaiians. If it ever were enacted and the public trust lands were conveyed to the Akaka bill entity, the trust lands would be thenceforth the property of all Hawaiians regardless of blood quantum and burdened with the obligation of providing homesteads to approximately 400,000 [3] Hawaiians rather than only native Hawaiians. the state does not have the resources to provide homesteads to the 25,937 native Hawaiians currently on the waiting lists, how will the Hawaiian Governing Entity be able to provide homesteads to more than 300,000 potential new applicants? The Akaka Bill, if implemented as planned by OHA, will result in a very serious deduction or reduction in benefits available to the native Hawaiians.

Based on the foregoing, it is extremely unlikely that either HHCA or §§ 4 and 5(f) of the Admission Act would ever be declared unconstitutional on equal protection grounds and, in any event, the Akaka Bill will not, in any way, help to validate these provisions favoring native Hawaiians. OHA expenditures of public trust funds in support of the Akaka Bill are in breach of the Defendants' duty of loyalty to the native Hawaiian Beneficiaries as a matter of law.

iii. Native Hawaiian Legal Corp.

In the federal case, OHA Defendants admitted that they have provided funding to three social welfare programs which provide benefits to Hawaiians without regard to blood quantum. Doc. 16, p. 87. The complaint alleges that these contributions were not restricted in use by the programs and may have been used by them without restriction as to blood quantum. Doc. 16, pp. 15-6, ¶ 11(b), (c), and (d).

Some or all of these unrestricted funds may have been used by these organizations to benefit native Hawaiians. It is very likely, however, that at least a portion of these funds were used solely ***25** for the benefit of non-native Hawaiian beneficiaries.

The purposes of these organizations is on the record herein only as they are described in the opinions filed in the federal district and appeals courts.

In their motion to dismiss filed herein, OHA defendants described the purposes of the NHLC, as follows:
As to the OHA trustees' use of trust funds to support NHLC, the court noted that OHA's contract with NHLC requires NHLC to “render legal services and provide legal representation to clients in substantive areas which shall include but shall not be limited to”:

(a) Assertion and defense of quiet title actions;

(b) Protection, defense and assertion of ahupua'a and kuleana tenant rights, including rights of access and rights to water;

(c) Land title assistance, including review of title and genealogy;

(d) Preservation and perpetuation of traditional and customary practices;

(e) Protection of culturally significant places, including burial sites and material culture; and

(f) Preservation of Native Hawaiian Land Trust entitlements. Day, 2008 U.S. Dist. LEXIS 48211, at *32.

Doc. 16, p. 57.

Assuming this to be true for the purposes of argument, it is clear that purposes paragraphs (a), (b) and (c) involve the provision of services to individuals with respect to their own individual property rights. If the individual involved was a native Hawaiian then the expenditure would have been proper. If the individual was a Hawaiian of less than one-half part blood quantum, the expenditure would have clearly been a breach of trust.

On the other hand, the purposes set forth in paragraphs (d), (e) and (f) deal with the provision of benefits that would apply to all Hawaiians in general, certainly without regard to blood quantum. This would be a clear breach of the duty of loyalty under the standard of H.R.S. § 673-1(b)(1) as the native Hawaiian beneficiaries would not benefit in any way differently than the non-beneficiary Hawaiians.

It is not known how NHLC actually used the public trust funds which OHA contributed to it. The court below ruled, “Nowhere does [the complaint] allege that defendants are using public trust funds specifically to better those of non-Native Hawaiian ancestry.” This is technically true. The allegation is that the Defendants have contributed unrestricted trust funds to programs which ***26** provide benefits to Hawaiians without regard to blood quantum. Appellants would argue that this is a prima facie breach of the trust and that it is up to the Defendants to show that the trust funds given to NHLC were actually used for the benefit of native Hawaiian beneficiaries. Therefore, Plaintiffs are seeking an accounting for these expenditures to see exactly what NHLC used them for and injunctive relief to prevent the expenditure of unrestricted trust funds in the future. Doc. 16, p. 17, a, b.

To the extent that the failure to specifically allege that these agencies have, in fact, used some or all of the trust funds for the specific benefit of non-beneficiary Hawaiians renders the complaint defective and subject to dismissal, Appellants attempted to amend the complaint to do so, as follows:

> a. Defendants have expended trust funds for the support of the Native Hawaiian Legal Corporation which funds are permitted to be and have been expended for the benefit of non-beneficiary Hawaiians without regard to the blood quantum.

Doc. 16, p. 284.

Contributing public trust funds to NHLC was a breach of Defendants' duty of loyalty to expend public trust funds solely for the benefit of native Hawaiians since NHLC was free to use those funds for the specific individual benefit of non-beneficiary Hawaiians or for the benefit of Hawaiians and native Hawaiians generally without the primary benefit being for the beneficiaries.

iv. Na Pua No ‘eau Education Program.

According to the Defendants' motion to dismiss, the purpose of Na Pua No'eau Education Program is as follows:
As to the OHA trustees' distribution of trust funds to the University of Hawai'i at Hilo, for Na Pua No'eau, the court recited that the purpose of the program was to provide for educational enrichment programs for Hawaiian children in grades K through 12 throughout the State and “to develop a stronger interest in learning, connect learning and education to one's Hawaiian identity, and explore possible educational, career and academic goals.” Day, 2008 U.S. Dist. LEXIS 48211, at *35-36.

Doc. 16, pp. 57-8 [emphasis added].

As in the case of NHLC, providing educational programs to children in grades K through 12 is an individual benefit to the particular children chosen to participate in the program. To the extent that those children are native Hawaiians, the expenditure of trust funds would be appropriate. To the extent that the children are non-beneficiary Hawaiians the expenditure is a breach of the duty of loyalty to administer the trust in the sole interest of the beneficiaries.

***27** Since there are many more non-beneficiary Hawaiians than native Hawaiians, it is extremely unlikely that all of the trust funds were appropriately expended solely for the benefit of native Hawaiian children. The complaint properly alleged a breach of the duty of loyalty to the extent that it alleges that unrestricted funds were contributed to Na Pua No'eau Education Program. Doc. 16, p. 16, 11(c). To the extent that a specific allegation that a portion of the funds was, in fact, actually expended for the benefit of non-beneficiary children was essential, Appellants attempted to correct that defect in the proposed amended complaint. Id., p. 284, ¶ 11(b).

v. Alu Like.

In their motion defendants quote the Ninth Circuit's description of the purposes of Alu Like, as follows:
“a nonprofit organization that strives to help *Hawaiians* and native Hawaiians achieve social and economic self-sufficiency through the provision of early childhood education and child care, **elderly** services, employment preparation and training, library and genealogy services, specialized services for at-risk youth, and information and referral services.” *Day*, 2008 U.S. Dist. LEXIS 48211, at *38.

Doc. 16, p. 58 [emphasis added].

Alu Like, therefore, deals exclusively with the provision of social services to individuals of Hawaiian ancestry without regard to blood quantum. As in the cases of the other agencies supported with public trust funds, to the extent that those services are provided to native Hawaiians they are appropriate. To the extent that they are provided to non-beneficiary Hawaiians it is a breach of the fiduciary duty of loyalty. As in the case of the other agencies, it should not have been necessary to specifically allege that Alu Like has actually expended funds to benefit non-beneficiaries. But to the extent that it was, Appellants attempted to correct the deficiency in the proposed amended complaint. *Id.*, p. 284, 11(c).

d. ***Damages.***

The complaint alleges generally that Plaintiffs have been damaged by the respective breaches of fiduciary duty in paragraph 13, as follows:

> 13. Plaintiffs have suffered injury in that the unlawful expenditures of trust funds as alleged herein have diminished the funds available to be expended for betterment of the conditions of the “native Hawaiian”

> beneficiaries pursuant to H.R.S. § 10-3(1), Article XII, §§ 4,5, and 6, and §§ 4 and 5(f) of the Hawaii Admission Act, in an amount to be proven at trial.

Id., p. 16, ¶ 113.

Thus, to the extent that expenditures of trust funds to support the Akaka Bill and/or the three ***28** social service agencies were misapplications of funds, the trust corpus was diminished by that amount and there was that amount less to provide for the betterment of the condition of native Hawaiians. The diminution of the corpus of the trust is sufficient injury to establish damages even though Defendants are not required to expend trust funds for the personal benefit of Plaintiffs individually. This was recognized in *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990), in which OHA trustees argued that Price lacked standing because the Admission Act does not require that trust funds be expended on native Hawaiians. The Ninth Circuit disagreed, as follows:

> The fact that the trustees may, consistently with § 5(f), spend the income for purposes other than to benefit native Hawaiians does not deprive Price of standing to bring his claim. We recently considered this very question, and determined that allegations such as those Price has made are sufficient to show an "injury in fact". See Price, 764 F.2d at 630.[fn2] In addition, allowing Price to enforce 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust. See Restatement 2d of the Law of Trusts, § 214(1), comment a; see also id. at § 391 (stating that plaintiff with "special interest," beyond that of ordinary citizen, may sue to enforce public charitable trust).

Price v. Akaka, supra., 928 F.2d at 826-7.

Footnote 2 states:

> The trustees argue that the Price decision on standing does not apply to this case because the relief sought in Price was prospective, while the relief sought here is retrospective. That difference, however, does not affect standing. We held in Price that native Hawaiians had standing to compel future compliance with the terms of 5(f) even though compliance would not necessarily result in use of § 5(f) assets to benefit native Hawaiians. Following that precedent, we hold here that Price, as a native Hawaiian, has standing to seek redress for past violations of § 5(f) even though that redress may not necessarily benefit native Hawaiians. Moreover, we note that counsel for Price asserted at oral argument that among the state-authorized purposes for which the OHA may spend its funds, only one - the benefit of native Hawaiians - is authorized by § 5(f). If Price succeeds in proving that the trustees have misappropriated § 5(f) income and must return it to the OHA or § 5(f) trust, he might attempt to show, perhaps in a pendent claim, that the returned money must be used to benefit native Hawaiians. Thus, Price has a real stake in enforcing the terms of § 5(f).

Id. at 826.

This view is consistent with H.R.S. § 10-16(c) which allows any native Hawaiian beneficiary to sue OHA trustees for any misapplication of trust funds even though OHA is not required to expend trust funds for the benefit of any particular beneficiary. Whenever funds are misappropriated, all beneficiaries suffer injury to the extent of the misappropriation merely from the ***29** fact that the trust corpus has been diminished. Any determination of monetary damages will not be recovered by the plaintiffs but restored to the trust corpus.

e. Summary.

The complaint satisfies the notice pleading stating a claim for breach of fiduciary duty by Defendant OHA trustees. The complaint alleges the elements of such claim in that Defendants owe Plaintiffs the duty of loyalty to administer the native Hawaiian public trust established by Article XII, Sections 4, 5 and 6 solely for the betterment of the conditions of native Hawaiians. Defendants have breached that duty by expending trust funds without regard to the not less than one-half part blood quantum requirement for beneficiaries of the trust. Plaintiffs as trust beneficiaries have suffered injury from the fact that the misappropriations of trust funds for the betterment of the conditions of non-beneficiary Hawaiians have diminished the trust corpus. The complaint properly states a claim for relief. The court below committed reversible error in dismissing the complaint for failing to do so. Nevertheless, to the extent that the original complaint is defective, the court below committed reversible error in denying the motion to amend the complaint.

B. Whether dismissal is appropriate on grounds of res judicata or collateral estoppel?

In their motion to dismiss, Defendants argued that Plaintiffs were barred from making a claim for breach of the trust established by §§ 4 and 5 of the Admission Act, as follows:

> Plaintiffs' claim of a breach of trust and misappropriation of funds from the trust established by sections 4 and 5(f) of the Admission Act is barred by res judicata, based upon the judgment in Day *v. Apoliona,* 2008 U.S. Dist. LEXIS 48211, * 17-18 (D. Haw. June 20,2008), affd 616 F.3d 918, 927 (9th Cir. 2010), cert. denied, 131 S. Ct. 1501 (2011), and the analysis in the affirming opinions of the district court and the Ninth Circuit. The federal courts have already conclusively determined that the expenditures at issue here do not constitute a breach of the trust established by the Admission Act, and that determination bars the claim here.

Doc. 16, pp. 62-3.

The answer to this argument is simple. In this case, Plaintiffs, are not claiming a breach of the trust established by §§ 4 and 5(f) of the Admission Act. In this case, Plaintiffs are claiming a breach of the OHA trust established by Article XII, Sections 4, 5, and 6 of the Hawaii Constitution and H.R.S. § 10-3(1).

As argued by Defendants below:
Res judicata, or claim preclusion, "is a doctrine 'that limit[s] a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and multiplicity of suits and to promote finality and judicial economy."' *Tortorello v.* ***30** *Tortorello,* 113 Hawai'i 432, 439, 153 P.3d 1117, 1124 (2007) (quoting *Bremer v. Weeks,* 104 Hawai'i 43, 53, 85 P.3d 150, 160 (2004)). Res judicata "prohibits a party from relitigating a previously adjudicated cause of action." *Id.* (quoting *Bremer,* 104 Hawai'i at 53, 85 P.3d at 160). The judgment of a court of competent jurisdiction "is a bar to a new action in any court between the same parties or their privies concerning the same subject matter," and "precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided." *Id.* (quoting *Bremer,* 104 Hawai'i at 53-54, 85 P.3d at 160-61).

The Hawai'i Supreme Court has held that the "policy reasons underlying both res judicata and collateral estoppel are several." *Ellis,* 51 Haw. at 56, 451 P.2d at 822. Although every litigant must have an opportunity to try his case on the merits, public policy "also requires that he be limited to one such opportunity." *Id.* "Furthermore, public reliance upon judicial pronouncements requires that what has been finally determined by competent tribunals shall be accepted as undeniable legal truth. Its legal efficacy is not to be undermined." *Id.* These doctrines also "tend 'to eliminate vexation and expense to the parties, wasted use of judicial machinery and the possibility of inconsistent results."' *Id.* (citation omitted).

The party asserting claim preclusion "has the burden of establishing that (1) there was a final judgment on the merits, (2) both parties are the same or in privity with the parties in the original suit, and (3) the claim decided in the original suit is identical

with the one presented in the action in question. Id. (quoting Bremer, 104 Hawai'i at 54,85 P.3d at 161*); see also Omerod v. Heirs of Kainoa Kupuna Kaheananui*, 116 Hawai'i 239, 264, 172 P.3d 983, 1008 (2007) (same).

The allegations in the *Day v. Apoliona complaint* are virtually identical to the allegations herein, see Complaint ¶¶ 9-11, with the exception that here, Plaintiffs allege that the trust at issue was established not only by sections 4 and 5(f) of the Admission Act, but also HRS section 10-3(1) and Article XII, sections 4,5 and 6 of the Hawai'i Constitution. Consequently, to the extent Plaintiffs assert a claim for breach of the trust under section 5(f) of the Admission Act, the claim is barred by res judicata, *as Day v. Apoliona* conclusively established that the expenditures complained of in that case, and here, are consistent with the provisions of 5(f).

Doc. 16, pp. 63-5.

Plaintiffs have no quarrel with this argument. Further, it is conceded that there was a final judgment on the merits in the federal court and the parties in this case are essentially identical to those in federal court. The only differences in parties are that Mel Hoomanawanui was a Plaintiff in the federal case and is not a Plaintiff in the original complaint herein (although he does wish to join this action and was added as a plaintiff in the proposed amended complaint). On the Defendants' side of the case, former trustees Carpenter, Cruz and Mossman have been replaced by Carmen ***31** Lindsey, Robert Lindsey, Jr., and Peter Apo. No claim has been made herein as to former trustees Cruz or Mossman and the claim against former trustee Carpenter has been dismissed herein. An additional claim against former trustee Heen made herein has also been dismissed. Plaintiffs Kealoha, Day, Kahawaiolaa, Hoohuli, proposed Plaintiff Hoomanawanui, and Defendants, Machado, Akana, Cataluna, Apoliona, Stender and Waihe‘e all appear in their respective capacities in both cases. The parties are essentially identical.

It is sufficient, however, to note that the claim brought in the instant action is not for breach of trust under §§ 4 and/or 5(f) of the Admission Act. The claim herein is for breach of trust under Article XII, Sections 4, 5, and 6 of the Admission Act and H.R.S. § 10-3(1). This state claim was, indeed, originally brought in *Day v. Apoliona*, but the federal court dismissed it without prejudice. The state claim was not litigated or decided in federal court. The doctrine of res judicata is simply not applicable.

The Defendants argued further however that even if the claim herein was not barred by res *judicata* it is barred by collateral estoppel. Their argument in the memorandum in support of the motion was as follows:

> Although the [federal] court determined that pursuant to federal law, OHA could properly expend funds for any one of the purposes set out in the Admission Act, the court also analyzed each expenditure to hold the OHA trustees could reasonably have exercised their considerable judgment and discretion to determine that each expenditure betters the conditions of native Hawaiians. These holdings estop Plaintiffs from asserting their State law claim here.

Doc. 16, p. 65.

Once again, Plaintiffs concede that the federal court did determine that each of the challenged expenditures could be justified as being within the discretion of the Defendant trustees as bettering the condition of native Hawaiians *under federal law*. However, the federal court specifically held that state law was not applicable to their analysis, as follows:
First, the only “breach of trust” § 5(1) refers to is “use” of funds “for any other object,” referring to the enumerated spending purposes. Id. (emphasis added). It does not encompass [** 14] any other restrictions under state law. Second, we find it implausible that Congress gave Hawaii discretion to choose how to manage the trust yet provided for federal intervention to enforce those choices, whatever they might be. Our reading is consistent with several of our cases assuming or suggesting that, as a matter of federal law, the only restriction that the statute places on § 5(f) trustees, including the OHA trustees with respect to the portion of the § 5(f) trust they administer, is that they use trust funds for enumerated purposes. In Price v. Akaka, 928 F.2d 824, 826 (9th Cir. 1991) (“Akaka ”), we assumed that § 5(f) did not require ***32** compliance with state law restrictions on

the OHA trustees when we explained that "[t]he fact that the [OHA] trustees may, consistently with § 5(f), spend the income for purposes other than to benefit native Hawaiians does not deprive [native Hawaiian beneficiaries] of standing to [sue under § 1983 for enforcement of the trust conditions]." Similarly in Price v. Akaka, 3 F.3d 1220, 1222 n.3 (9th Cir. 1993) ("Akaka I"), we treated the question "[w]hether the (** 15] trustees breached their fiduciary duties under Chapter 10 of the [Hawaii Revised Statutes]" as "a matter of state law which we do not reach." And when we considered this case in a previous appeal we noted that "neither our prior case law nor our discussion today suggests that as a matter of federal law § 5(f) funds must be used [by OHA trustees] for the benefit of [n]ative Hawaiians or Hawaiians, at the expense of other beneficiaries." Day I, 496 F.3d at 1033 n.9 (emphasis added).

Doc. 16., p. 99.

Thus, the decision of the federal court was made without regard to restrictions of state law which clearly are more restrictive than § 5(f) itself. Specifically the Court of Appeals rejected the provisions of H.R. S . § 673-1(b)(1), as follows:
Plaintiffs urge that an expenditure is outside the bounds of a reasonable judgment unless it is "in the sole interest of... beneficiaries; provided that such expenditures may provide a collateral benefit to non-beneficiaries, but only so long as the primary benefits are enjoyed by... beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the... beneficiaries." For example, they contend that projects that do not distinguish between "native Hawaiians" and "Hawaiians" cannot be a use "for the betterment of the conditions of native Hawaiians" unless they ultimately direct more dollars or services to native Hawaiians than to others.

We reject [**20] such a rule because nothing in the trust's terms or purposes either requires the kind of comparative analysis plaintiffs propose or suggests that Congress intended to prohibit expenditures whose benefits may extend beyond the trust's purposes.

Doc. 16, p. 100.

Plaintiffs cannot be collaterally estopped from raising issues here in state court that were attempted to be raised in federal court but not considered there and dismissed without prejudice. Pele Defense Fund v. Paty, 3 Haw. 578, 600, 837 P.2d 1247 (1992).
In PDF v. Paty, the court said:
In *Morneau,* we also commented on the implications of the doctrine of collateral estoppel:

Collateral estoppel is an aspect of res judicata which precludes the relitigation of a tact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies... . Collateral estoppel also precludes relitigation of facts or issues previously determined when it is raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue. ***33** 56 Haw. at 423, 539 P.2d at 475 (citations omitted). These principles are tempered only by the prerequisite that a plaintiff have a full and fair opportunity to litigate the relevant issues. *See Morneau,* 56 Haw. at 421-22, 539 P.2d at 474; *see also Allen v. McCurry,* 449 U.S. 90,95 (1980) (noting a long recognized exception that "collateral estoppel cannot apply whenthe party against whom the earlier decision is asserted did not have a 'full and fair opportunity to litigate that issue in the earlier case").

PDF v. Paty, supra, 73 Haw. at 599-600.

In the instant case,

If the Ninth Circuit had held that state law does apply under § 5(f) and that under federal law, the trustees must comply with the provisions of H.R.S. § 673-1(b)(1) and still held that the Defendant had discretion to use trust funds in the manner alleged

herein, then Plaintiffs would be barred by res judicata and/or collateral estoppel from relitigating that issue. However, the Ninth Circuit carefully and purposefully avoided a consideration of the Defendants standards of care and duties under state law. Those issues were not decided and were purposefully left for the state court to adjudicate. Appellants did not have any opportunity, let alone a "full and fair" one, to litigate those state claims in federal court. Res judicata and collateral estoppel do not apply.

In *PDF v. Paty, supra*, the court held that, in interpreting the provisions of the native Hawaiian public trust, Hawaii courts are free to impose more strict standards of care and duties on the trustees under state law than the federal courts may impose under § 5(f), as follows:

> The State argues that, because the Ninth Circuit ruled that the Admission Act creates no private implied right of action, there can be no private right of action to enforce the terms of the § 5(f) trust under Hawaii law. *See Keaukaha* I, 588 F.2d 1216 (1978), cert. denied, 444 U.S. 826 (1979). We disagree. We have held, in a variety of contexts, that this court is not precluded from finding that the Hawaii Constitution affords greater protection than required by similar federal constitutional or statutory provisions. See, e.g., State v. Kam, 69 Haw. 483,748 P.2d 372 (1988); *Hawaii Hous. Auth. v. Lym*an, 68 Haw. 55,704 P.2d 888 (1985); State v. Tanaka, 6 Haw. 658,701 P.2d 1274 (198); *and State v. Russo, 67 Haw.* 126, 681 P.2d 553 (1984) appeal after remand, 69 Haw. 72, 734 P.2d 156 (1967).

PDF v. Paty, supra, 73 Haw. at 601.

As a final consideration, the purposes of the doctrines of res judicata and collateral estoppel of judicial economy would not be served by applying these doctrines in this case. Doing so would precluded the four/five Plaintiffs in this case from litigating the issues raised herein. However, these doctrines would not preclude any other of the 40-80,000 native Hawaiian beneficiaries from bringing an identical suit. There is absolutely no policy reason that can justify a rule that would prevent these particular five beneficiaries from suing when there are thousands of other beneficiaries who could ***34** do so.

V. CONCLUSION

Based on the foregoing argument and authorities, Plaintiffs respectfully request that this court vacate the judgment of the court below, hold that the Defendants have breached their fiduciary duty of loyalty by making expenditures of public trust funds without regard to blood quantum and remand the matter to the court below for a determination of the amount of damages.

Footnotes

1 It should be noted that the court reporter, Lahela Kamalani-Moe, very likely a non-beneficiary Hawaiian, transcribed the term "native Hawaiian" with a capital "N" in not less than 36 instances throughout the transcript. OHA defendants customarily use the term "Native Hawaiian" with a captal "N" to refer to all Hawaiians without regard to blood quantum.

2 http://hawaii.gov/dhhl/application-wait-list/12-31-09/2009-12-31_03-Hawaii_Waitlist_158pgs.pdf

3 Appellants dispute the 130,000 figure as the population of Hawaiians not meeting the blood quantum used by Justice Breyer in the quoted portion of his concurring opinion in Rice v. Cayetano quoted above. Appellants cite census data showing that more than one million people claim to be part Hawaiian or other Pacific Islander.